

Robert Kenney
Nicholas B. Malito
HOFHEIMER GARTLIR & GROSS, LLP
530 Fifth Avenue
New York, New York 10036
Telephone: 212-818-9000
Facsimile: 212-869-4930
rkenney@hgg.com
nmalito@hgg.com

-and-

Panagiota Betty Tufariello
INTELLECTULAW
THE LAW OFFICES OF P.B. TUFARIELLO, P.C.
25 Little Harbor Road
Mount Sinai, New York 11766
Telephone: 631-476-8734
Facsimile: 631-476-8737
betty@intellectulaw.com

Counsel for Defendants Invar Consulting Ltd., Genometrica Ltd., and Genometrica Research, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VERA GORFINKEL,

Plaintiff,

-against-

RALF VAYNTRUB, INVAR CONSULTING
LTD., GENOMETRICA LTD. and
GENOMETRICA RESEARCH, INC.

Defendants.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAY 28 2013 ★

LONG ISLAND OFFICE

CV 13 3093

BIANCO, J.

Case No.:

NOTICE OF REMOVAL

Jury Trial Demanded

TOMLINSON, M

To the Clerk of the United States District Court for the Eastern District of New York:

Defendants Invar Consulting, Ltd., Genometrica Ltd., and Genometrica Research, Inc.

(the "Served Defendants") file this Notice of Removal of the above-titled action from the

Supreme Court of the State of New York, County of Suffolk (the "State Action") to the United

States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1441 and 1446, Federal Rules of Civil Procedure R. 81(c) and EDNY L. R. 81.1. This Court has original and exclusive subject matter jurisdiction over the State Action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338 because the State Action Plaintiff Vera Gorfinkel (the “State Action Plaintiff”) claims non-infringement of patents in both her Complaint and Amended Complaint.

In support of this Notice of Removal, the Served Defendants state as follows:

1. On or about November 4, 2011, the State Action Plaintiff commenced the State Action in the Supreme Court of the State of New York, County of Suffolk , by filing her Summons with Notice with the aforementioned Court. The Summons with Notice did not raise any Federal claims. A copy of Plaintiff’s Summons with Notice is annexed hereto as **Exhibit A**.

2. On or about November 29, 2011 Genometrica Research Inc. filed a Civil Action in the United States District Court for the Eastern District of New York (“this Court”) against Boris Gorbovitski, Vera Gorbovitski a/k/a Vera Gorfinkel, and Advanced Biomedical Machines Inc. (the “Federal Action Defendants”), entitled Genometrica Research Inc., and The Research Foundation of the State University of New York, pursuant to Art. VII of its July 1, 1999 Exclusive License Agreement with Genometrica Research Inc. v. Boris Gorbovitski, Vera Gorbovitski a/k/a Vera Gorfinkel, and Advanced Biomedical Machines Inc., Civil Case Number 11-CV-5802 (the “Related Case”) (CASE #: 2:11-cv-05802-PKC-AKT, Doc. 1).

3. Vera Gorbovitski a/k/a Vera Gorfinkel, one of the Federal Action Defendants is the same person as the State Action Plaintiff.

4. On or about December 5, 2011, Defendant Genometrica Research, Inc. agreed to accept service of the State Action Plaintiff’s Summons with Notice.

5. On or about January 19, 2012, the Federal Action Defendants moved to dismiss the Related Case (CASE #: 2:11-cv-05802-PKC-AKT, Doc. No. 7).

6. On or about January 25, 2012, Defendant Genometrica Research, Inc. served its Demand for Complaint in the State Action. A copy of Genometrica Research, Inc.'s Demand for Complaint is annexed hereto as **Exhibit B**.

7. On or about February 2, 2012 the State Action Plaintiff brought a motion by Order to Show Cause, to stay proceedings in the State Action pending a decision on the motion to dismiss in the Related Case. A copy of the State Action Plaintiff's motion papers are annexed hereto, collectively as **Exhibit C**.

8. On or about February 2, 2012, the Supreme Court of the State of New York, County of Suffolk issued an Order that extended the State Action Plaintiff's time to serve a Complaint upon Defendant Genometrica Research, Inc. until 10 days after the State Court issues a final determination on the State Action Plaintiff's Motion to Stay. A copy of the Order is annexed hereto as **Exhibit D**.

9. On or about February 23, 2012, Defendant Genometrica Research Inc. filed its opposition to the State Action Plaintiff's February 2, 2012 motion for stay. A copy of Genometrica Research Inc.'s opposition papers is annexed hereto as **Exhibit E**.

10. The State Action Plaintiff's February 2, 2012 motion for stay is still pending.

11. On or about February 2, 2012, the State Action Plaintiff served Defendants Genometrica Ltd. and Invar Consulting Ltd. with her Summons with Notice. Copies of the service papers for these two Defendants are annexed hereto, collectively, as **Exhibit F**.

12. The State Action Defendant Ralf Vayntrub resides overseas and the State Action Plaintiff has not served him in the State Action. The State Action has been pending for almost

one and a half years.

13. On or about March 2, 2012, Genometrica Ltd. and Invar Consulting Ltd. served their Demand for Complaint. A copy of Genometrica Ltd and Invar Consulting Ltd.'s Demand for Complaint is annexed hereto as **Exhibit G**.

14. On or about March 15, 2012, the Supreme Court of the State of New York, County of Suffolk issued an Order that extended the State Action Plaintiff's time to serve a Complaint upon Genometrica Ltd. and Invar Consulting Ltd. until after the State Court issues a final determination on the State Action Plaintiff's Motion to Stay. A copy of the Order is annexed hereto as **Exhibit H**.

15. The State Action Plaintiff's Motion to Stay is still pending.

16. On or about April 2, 2012, Genometrica Research Inc. filed its First Amended Complaint in the Related Case (CASE #: 2:11-cv-05802-PKC-AKT, Doc. No. 20).

17. On or about April 21, 2012, the Federal Action Defendants filed a motion to dismiss the First Amended Complaint in the Related Case (CASE #: 2:11-cv-05802-PKC-AKT, Doc. No. 24).

18. On or about January 31, 2013, this Court issued its Memorandum of Decision and Order that denied in part and granted in part the Federal Action Defendants' motion to dismiss the First Amended Complaint in the Related Case (CASE #: 2:11-cv-05802-PKC-AKT, Doc. No. 43).

19. On or about April 26, 2013, the State Action Plaintiff served a copy of her Complaint upon the Served Defendants. Plaintiff's Complaint raised a claim for, *inter alia*, defamation of character based on false allegations of patent infringement. A copy of Plaintiff's Complaint is annexed hereto as **Exhibit I**. As a result of the State Action Plaintiff's Complaint,

this Court has original and exclusive jurisdiction over the State Action, pursuant to 28 U.S.C. §§ 1331 and 1338.

20. On May 3, 2013, the Served Defendants brought their own Motion to Dismiss the State Action. Copies of these motion papers are annexed hereto as **Exhibit J**. This motion is currently before the Supreme Court of the State of New York, County of Suffolk, which recently re-scheduled hearing on the motion for May 30, 2013. That date is several days after the Served Defendants' deadline to remove to the State Action.

21. On or about May 6, 2013, the State Action Plaintiff served a copy of her Amended Complaint upon the Served Defendants in the State Action. A copy of the State Action Plaintiff's Amended Complaint is annexed hereto as **Exhibit K**.

22. On Friday May 24, 2013, the served Defendants were served with the State Action Plaintiff's opposition papers to their Motion to Dismiss the State Action and Cross Motion. Copies of each of the State Action Plaintiff's opposition papers and cross motion respectively, are annexed hereto as **Exhibit L**.

23. In her Amended Complaint (Exhibit K), the State Action Plaintiff makes, in addition to the claims contained in her initial Complaint, a claim for declaratory judgment, asking the State Court to declare that she did not infringe on certain patents that are also the subject of patent-infringement claims in the Related Case. This Court has original and exclusive jurisdiction over that claim pursuant to 28 U.S.C. §§ 1331 and 1338.

24. Pursuant to 28 U.S.C. § 1338 Federal District Courts have original and exclusive jurisdiction of any and all claims for patent infringement or claims that comprise an element of patent infringement. Under 28 U.S.C. § 1367 this Court also has supplemental jurisdiction over all other related claims in this action within such original jurisdiction that they form part of the

same case or controversy under Article III of the United States Constitution.

25. In the Related Case, Genometrica Research Inc. has, *inter alia*, made a claim for infringement of the same patents that are the subject of the State Action under 35 U.S.C. § 271 *et seq.* Moreover, a substantial portion of the facts and circumstances in both the State Court Action and the Related Case are the same and/or similar. The two cases involve the exact same transactions, actions, omissions, and time lines. Thus, this removed action should be consolidated with the Related Case under 28 U.S.C. § 137 and Rule 50.3.1 of the United States District Court for the Eastern District of New York Guidelines for the Division of Business Among District Judges.

26. No discovery has transpired in the State Action.

27. State Action Plaintiff Vera Gorfinkel is a natural person who, upon information and belief, is domiciled in the County of Suffolk, and the State of New York.

28. State Action Defendant Genometrica Research Inc. is a corporation formed under the laws of the State of Delaware, and authorized to conduct business in the State of New York. Genometrica Research Inc.'s principal place of business is located in the City, County and State of New York.

29. State Action Defendant Genometrica Ltd. is a foreign company with its primary place of business located in Vaduz, Lichtenstein.

30. State Action Defendant Invar Consulting Ltd. is a foreign company with its primary place of business located in Laguno, Switzerland

31. It is believed and therefore averred that there is no other Defendant whose consent and joinder is required in order to remove this action.

32. The United States District Court for the Eastern District of New York has original

and exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1331 and § 1338 because, it contains a claim for declaratory judgment related to patent claims already before this Court and because, upon information and belief, Plaintiff resides in the Town of East Setauket, County of Suffolk, State of New York.

33. For all the foregoing reasons, removal of the State Action to this District Court is proper under 28 U.S.C. § 1441(a).

34. This notice to remove is timely under 28 U.S.C. § 1446(b) because the Served Defendants have filed within 30 days of Plaintiff's service of her Complaint on April 26, 2013.

35. The undersigned counsel has been retained to represent the Served Defendants in the within matter and the Served Defendants consent to the jurisdiction of this Court.

36. Notice of this filing is being given to all adverse parties in accordance with 28 U.S.C. § 1446(d) simultaneously with the filing of the instant pleading.

37. Promptly after filing this Notice of Removal, a copy will be filed with the Supreme Court of the State of New York, County of Suffolk in accordance with 28 U.S.C. § 1446(d).

38. The served Defendants demand a trial by jury.

[INTENTIONALLY LEFT BLANK]

WHEREFORE, the Served Defendants pray that the above-captioned matter, now pending against them in the Supreme Court of the State of New York, County of Suffolk, be removed therefrom to the United States District Court for the Eastern District of New York and consolidated with the Related Case, Civil Action No. 2:11-cv-05802-PKC-AKT for all purposes.

Dated: Tuesday, May 28, 2013

Respectfully submitted,

INTELLECTULAW
THE LAW OFFICES OF P.B. TUFARIELLO, P.C.

By: *Panagiota Betty Tufariello*

Panagiota Betty Tufariello
25 Little Harbor Road
Mount Sinai, New York 11766
Telephone: 631-476-8734
Facsimile: 631-476-8737
betty@intellectulaw.com

-and-

Robert Kenney
Nicholas Malito
HOFHEIMER GARTLIR & GROSS, LLP
530 Fifth Avenue
New York, New York 10036
Telephone (212) 818-9000

Attorneys for the Defendants
Genometrica Research, Inc.
Genometrica Ltd.
Invar Consulting Ltd.

CERTIFICATE OF SERVICE

I, PANAGIOTA BETTY TUFARIELLO, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, hereby affirm under penalty of perjury that a true and correct copy of Defendants' NOTICE FOR REMOVAL together with its EXHIBITS A-L, has been served upon the Attorneys for Plaintiff via E-MAIL and VIA EXPRESS MAIL, addressed to:

Arthur Morrison, Esq.
11 Skyline Drive
Hawthorne, NY 10532
phone: 914-592-8282

William V. Rapp, Esq.
85 River Road
Scarborough, NY 10510
phone: 914-945-0630

Robert Greenberg, Esq.
Robert Greenberg, P.C.
228 Park Avenue South
New York, NY 10003
phone: 6463600077

on Tuesday, May 28, 2013


Panagiota Betty Tufariello, Esq.